Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2004

BRUCE ISAACKS and DARLENE A. WHITTEN,
Petitioners

v.

NEW TIMES, INC., d/b/a DALLAS OBSERVER, DALLAS OBSERVER, L.P., ROSE FARLEY, JULIE LYONS, and PATRICK WILLIAMS,
Respondents

On Petition for Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR WRIT OF CERTIORARI

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February 3, 2005

QUESTIONS PRESENTED

I.

Whether the Texas Supreme Court erred in holding that in *Hustler Magazine v. Falwell* the United States Supreme Court "implicitly rejected" a literal application of the actual malice rule of *New York Times v. Sullivan* in defamation cases involving purported satire.

II.

Whether the opinion of the Texas Supreme Court erroneously expands the rule in *New York Times v. Sullivan* beyond its intended scope effectively immunizing media defendants from liability for libel of a public official as long as the publication is defended as an attempted satire, even if the defamatory false statements were made with actual "knowledge of the falsity or reckless disregard for the truth," and even if the article is formatted, labeled, and placed in a context to be taken as a report of actual events by an "average reader of ordinary intelligence."

III.

Whether the Texas Supreme Court's opinion improperly equates the hypothetical "reasonable man" of the negligence case with the "average reader of ordinary intelligence" discussed in *Hustler Magazine v. Falwell* and thereby effectively immunizes media defendants from liability for libel as long as the defendant claims the offending article was satire.

IV.

Whether the Texas Supreme Court erred in finding that no fact question for a jury was presented and in holding as a matter of law that no "average reader of ordinary intelligence" could have believed that the offending article was a report of actual events.

V.

Whether the Texas Supreme Court erred in holding that Petitioners failed to raise summary judgment evidence of constitutional "actual malice" even though the summary judgment proof demonstrated that the Respondents had actual knowledge that the offending news article was untrue, and even though the summary judgment proof demonstrated that the article was believed to be an account of actual events by many "average readers of ordinary intelligence" including members of the print and broadcast media, lawyers, college professors, college students, and others.

VI.

Whether the Texas Supreme Court erred in holding that *Hustler Magazine v. Falwell* forecloses the use of evidence of common law malice as evidentiary of constitutional malice.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs below) are Bruce Isaacks, Criminal District Attorney of Denton County, Texas and Darlene A. Whitten, Judge of the County Court At Law Number One, Denton County, Texas, the statutorily designated Juvenile Court for Denton County, Texas.

Respondents (Defendants below) are New Times, Inc. (owner/publisher of an alternative weekly newspaper), d/b/a Dallas Observer (the weekly), Dallas Observer, L.P. (owner/publisher), Rose Farley Reporter), Julie Lyons (Editor), and Patrick Williams (Managing Editor).

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Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORAI

Bruce Isaacks and Darlene A. Whitten respectfully petition for a writ of certiorari to review the opinion and judgment of the Texas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Texas Supreme Court in favor of the Defendants (Respondents herein) is reported at 146 S.W.3d 144. See Appendix 1. The opinion of the Court of Appeals for the Second District of Texas ruling for Plaintiffs (Petitioners herein) is reported at 91 S.W.3d 844. See Appendix 3.

JURISDICTION

The Texas Supreme Court handed down its decision on September 3, 2004 and denied motion for rehearing on

November 5, 2004. Order denying rehearing attached as Appendix 2. Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional provisions are United States Const., Amend. 1; Tex. Const. art. 1 §§ 8, 13; Tex. Const. art V, § 1-a; Tex. Civ. Prac. & Rem. Code § 73.01; and Tex. Loc. Gov't Code §§ 87.011, 87.013. Pursuant to Sup. Ct. Rule 14(1)(f) these provisions are contained in Appendix 5.

STATEMENT OF THE CASE

Procedural history

The defamatory article was published on November 11, 1999. Petitioners filed suit on November 30, 1999. Respondents filed motions for summary judgment claiming (1) that the article was protected opinion in the nature of a satire or parody, and (2) that there was no evidence of actual malice. The trial court denied these motions in separate hearings, and Respondents took interlocutory appeals to the Second Court of Appeals of Texas, sitting at Fort Worth.[1] and on November 21, 2002 the court of appeals affirmed, holding in pertinent part (1) that a genuine issue of material fact exists whether a reasonable reader of average intelligence could construe the article as a statement of actual fact; (2) that the test for actual malice adopted by the Supreme Court in *New York Times, Inc. v. Sullivan*[2] applies to claimed satire and that the *Observer* failed to establish lack of actual malice as a matter of law; (3) that satire or parody that conveys a substantially false and defamatory impression is not protected under the First Amendment as mere opinion or rhetorical hyperbole, but

[1] The appeals were consolidated.
[2] 376 U.S. 254 (1964).

instead is subject to scrutiny as to whether it makes a defamatory statement of fact; (4) that there is evidence raising a genuine issue of material fact that the article fails to provide adequate notice to a reasonable reader of average intelligence that it was a satire, and that such a reader could conclude that the article made defamatory statements of fact; and (5) that the *Observer* failed to establish as a matter of law that a reasonable reader of average intelligence would perceive or understand that the publication did not make false statements of actual fact concerning Isaacks and Whitten.

Respondents timely filed a petition for review with the Texas Supreme Court.[3] By opinion dated September 4, 2004 that court issued its opinion and judgment reversing and rendering judgment for the media defendants holding that (1) as a matter of law a "reasonable reader" could not have believed the article to depict actual facts about Petitioners; (2) as a matter of law Petitioners did not produce evidence of actual malice; (3) Petitioners' summary judgment evidence that many[4] who read the article and believed it to be true is not competent to raise an issue of fact for the jury that a reasonable reader of average intelligence could believe the article to be true; (4) the reasonable reader of average intelligence discussed in *Hustler Magazine v. Falwell*[5] is identical to the fictional "reasonable man" of negligence law, and this fictional character never acts unreasonably and "can tell the difference between satire and sincerity;" (5) in *Falwell,* the United States Supreme Court "implicitly rejected a literal application of the actual malice rule to works involving satire or parody;" (6) instead of a literal application of the

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[3] The court granted the petition and requested briefs on the merits.

[4] These readers were alleged by Petitioners to be "reasonable readers of average intelligence."

[5] 485 U.S. 46 (1988).

New York Times actual malice rule, the correct inquiry is whether "the publisher knew or had reckless disregard for whether the article could reasonably be interpreted as stating actual facts." (7) evidence of common law malice cannot be taken as circumstantial evidence of constitutional actual malice, even when coupled with the publisher's admission that she knew the article was untrue when published.

Petitioners herein filed a timely motion for rehearing[6] which was denied by order dated November 5, 2004, and now seek relief from this Court.

Facts—the "madness article"

On November 11, 1999, the *Dallas Observer*, a newsweekly that by its own description is devoted to hard-hitting investigative journalism,[7] published an article in its newspaper [the "Madness article"] and on its web site[8] (CR 171-172[9]). The article was published under the heading of

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[6] Appendix 2.

[7] The New Times website claims that its thirteen newsweeklies "make a difference in our communities, by breaking news, by taking time to interpret it, and by offering readers a weekly respite from the hurried fact-finding of daily journalism.... As many daily papers shorten stories and hire consultants to tell them what to print, New Times papers thrive by cultivating networks of local sources, generating truly original story ideas, and digging into stories rather than skating across their surface." www.newtimes.com/overview.html. The *Dallas Observer* is portrayed as a "paper ... known for its hard-edged investigative stories about government, politics and business, as well as its pointed, provocative coverage of sports, music and the arts." www.newtimes.com/profiles_dal.html.

[8] The article is attached as Appendix 6.

[9] References are to the Clerks Record in the State Court Proceeding. The entire record is not brought forward pending this Court's decision whether to grant the writ.

"News"[10] and stated that "[i]n the second homework-related arrest in as many weeks, A Denton County juvenile court judge [Whitten] jailed a Ponder student for suspicion of making a terroristic threat after the first-grader wrote a book report on the children's classic *Where the Wild Things Are."* The jailed student was described as "Cindy Bradley, a diminutive 6-year-old," brought before Whitten in "handcuffs, and ankle shackles." Whitten was reported to have ordered the child detained for ten days "while prosecutors contemplate whether to file charges." The article contained phony "quotes" from real people, including Petitioners, then Governor George W. Bush, the Superintendent of Schools, and a representative of the American Civil Liberties Union.[11] The story was a total fabrication. No such child exists, nor any similar child. There was no such event as depicted by the *Observer's* so-called "News" story. None of the persons quoted in the

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[10] The article was published at pages 11 and 13 of the November 11 - 17, 1999 issue of the Observer in a section of the paper labeled "News". The article is also indexed as "News," and was sandwiched between two legitimate news stories. Originally on the web site the article was labeled "News" but on or about November 18, 1999 it was relabeled "Satire" in an apparent reaction to the large number of readers who had believed the story to be true. However, as late as June 23, 2003 if one looks in the Observer's archives on its web site it will find the article "Stop the Madness" still labeled as "News." The article is attached as Appendix 6.

[11] The article quoted Whitten as stating from the bench:

> Any implication of violence in a school situation, even if it was just contained in a first grader's book report, is reason enough for panic and overreaction, ... It's time for you to grow up, young lady, and it's time for us to stop treating kids like children.

Isaacks was reported as stating "that he hasn't decided whether to prosecute Cindy," and quoted as saying "[w]e've considered having her certified to stand trial as an adult, but even in Texas there are some limits."

article ever spoke to Farley, the author, or any other person at the *Dallas Observer*. Nowhere in the subject article or elsewhere in the November 11 - 17, 1999 issue of the *Dallas Observer* is there is any disclaimer or warning that the story is intended as satire, parody or fiction.

The "Stop the madness" article was conceived and authored by Farley, a staff writer for the *Observer*, and it was published after input, editing, and approval by Williams, the *Dallas Observer's* managing editor, and Lyons, its editor-in-chief (CR 391-405). Respondents testified that the article was intended to be satire, but "written as if it were a 'straight news' story" (CR 392). To make the article believable, Defendants included a photograph of a six-year-old girl, purporting to be Cindy Bradley, but actually the daughter of an *Observer* staffer.[12] Immediately preceding the madness article was another hard news story "Return to Sender" about a Mexican man who was nearly deported due to INS ineptitude. Carefully juxtaposed immediately after the Madness article was a hard news article praising various *Dallas Observer* staff members, and especially the author Rose Farley for awards she had won as a serious and accomplished hard news journalist (CR 172). Farley had not previously published any works of satire or parody and her work for the *Observer* has been confined to hard news. (Deposition of Rose Farley, 42 CR 632,645).

Facts—the public reaction

Upon publication of the article, an overwhelming outcry arose from its readership in the nature of scorn, ridicule,

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[12] One need not be a journalist to recognize that column inches in a hard news story are carefully allotted by the editor. Photographs take up valuable space, but are used to lend credence to and draw attention to an article.

and criticism of Isaacks and Whitten. Many readers contacted the *Observer* through correspondence and electronic mail expressing their belief that the story was factual and criticizing the Plaintiffs.[13] Lyons "began receiving telephone calls and electronic mail messages from people who seemed to believe that the article's fictional account … was true" shortly after its publication. [Brief of Appellants, Court of Appeals, 8] This led Lyons to change the label above the story from "News" to "Satire" on the *Dallas Observer's* web site. [*Id.*]

In addition, Isaacks and Whitten and their respective staffs received the same type of public comment from readership of the article and from the news media in general which exhibited a general view that the "madness" article had been factual. On November 11th Judge Whitten's office was inundated with calls from citizens and members of the news media, who had seen the story, apparently believed it, and were calling for an explanation why the Judge had shackled and jailed a six year old child. Whitten continued to be sought by reporters for some time after the publication of the article, most of whom had taken the article to be a straight news story (CR 409-414[14]). Affidavit of Whitten, Appendix 7.

Isaacks received similar treatment. (CR 511, 522-526).[15] District Attorney Isaacks stated that he received

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[13] As one example a reader emailed the *Observer*:

> This is the responsibility of the parents. The judge in this case should be shackled for not seeing it this way and the prosecutor should be looking for criminals. Shame on all adults involved in this case!

[14] Redacted copies of the Whitten and Isaacks affidavits are attached as Appendices 7 & 8.

[15] Among the e-mails received by Isaacks was one which stated:

> "I read the article in the Dallas Observer about the arrest of six year old Cindy Bradley. You folks must all be smoking dope. Who in the hell is running our county. I want some people

calls from several major news agencies in the Dallas Metroplex. For 4 to 6 weeks after the article he was repeatedly questioned and sometimes accosted by citizens or strangers and well known acquaintances including attorneys who wanted to know why he would prosecute a 6 yr. old girl.[16] Isaacks received numerous expressions of concern, disappointment and outrage from various individuals in audiences when he gave speeches to civic and business groups. A great majority of the people who confronted him about the article believed it to be a true news story when they read it.[17]

Another irate citizen sent an e-mail to Wesley Shackleford, an attorney with the Texas Juvenile Probation Commission asking whether Judge Whitten could be removed from the bench.[18]

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fired. DA Bruce Isaacks fired if he presses charges. Judge Darlene Whitten should be removed from the bench for her commits [sic.]. I hope this little girls parents sues the county for every dime."

"I can't believe you guys are pulling this crap. You have people killing each other and shooting heroin in their eyelids and you guys are arresting six-year-olds. What in the world is going on? I read where you were thinking of trying her as an adult. I think Amnesty International should be called because the crap doesn't go on in third world countries."

[16] Under Texas law a child under the age of 10 cannot be prosecuted.

[17] Isaacks affidavit, Appendix 8.

[18] The e-mail stated in part:

"I have just read an article in the Dallas Observer about a six year old that was placed in the Denton County Juvenile Detention Center.... I am very troubled by the comments she [Judge Whitten] made from the bench.... This from someone who is going to have influence in creating law for juveniles in our State? ... I would really like a response to these questions. I am very scared for our children in Texas after what I have read." (CR 413, 418).

Judge Whitten received a voice mail from an individual identifying herself as an employee of Boeing Electronics. The voice mail stated that the caller and her colleagues at Boeing were outraged by the treatment of Cindy Bradley and would do everything in their power to defeat Judge Whitten at the next election. (CR 411).

Facts—Media Reaction

Public reaction to the *Dallas Observer* story was exacerbated because other members of the media believed the story to be a factual account of a real juvenile court proceeding. Perhaps the most damaging of these was a report on the popular KRLD 1080 radio program the "Charlie Jones Show". Jones originally reported the item as hard news and read significant excerpts from the article. Amy Iverson, producer of the Charley Jones Show called wanting comment on the story from Judge Whitten. (CR 410-411; Deposition of Charley Jones at 20-21; 24-30; 98-100; CR741). Jones testified, "My impression was that it [the madness article] was real." Jones expressed this belief to his radio audience many of whom were misled.[19] Substantial evidence that the "average reader of ordinary intelligence" not only could be, but was in fact confused is established by the flood of emails, angry phone calls, and an article in the newspaper of a major state school calling for the removal of Isaacks and Whitten from office. A newspaper article was published in the *North Texas Daily* of the University of North Texas on November 27, 1999, and posted on its web site. The *Daily* said the Petitioners were "too incompetent to serve the populace" and called for

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[19] Excerpts from Jones deposition and his radio broadcast are set out in Appendix 9.

their dismissal from office, based upon their conduct as described in the *Dallas Observer* article (CR 174).

Judge Whitten received a call from Steve Stoller of the Dallas Fox 4 News television who told her that there was a news story in the *Dallas Observer* stating that the Judge had incarcerated a six-year-old girl. From Stoller's demeanor and the tone of his voice Judge Whitten believed him to be seriously inquiring about what he believed to be an actual news story. Judge Whitten received similar calls from other reporters from major media outlets who took the *Observer* story seriously. Whitten Affidavit, Appendix 7. Adding insult to injury the *Observer* defended its action as a satire of an earlier incident that was inaccurately reported.[20]

After Plaintiffs demanded a retraction of the November 11 publication, the *Dallas Observer* published another article, authored by Williams, which refused an apology, but which admitted that the story was not real, that "[w]e made it up" (CR 178) and admitting that "Stop the madness" was published "in a space normally reserved for straight-up news stories." The statements were admittedly manufactured from whole cloth and made with knowledge of their falsity.

Errors by Texas Supreme Court

The First Amendment to the United States Constitution protects freedom of speech and of the press and its values are mirrored by the Texas Constitution. TEX. CONST. art. I, §§ 8 & 13. See Appendix 5.

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[20] The Chris Beamon incident was inaccurately reported by the Dallas Morning News and other traditional media. Judge Whitten was forbidden by Canons of Judicial Ethics and privacy laws protecting Juvenile offenders from commenting at the time. The only competent evidence of that incident is set forth in her Affidavit, Appendix 7.

The Texas Supreme Court[21] erred by failing to use the test for actual malice set out by this Court in *New York Times v. Sullivan,* and substituting its own test for actual malice in cases involving satire. The test adopted by the court below goes beyond determining whether the publisher knew that statements of fact it made were false when published, or acted in reckless disregard of whether they were true or not. *New York Times v. Sullivan.*[22] The court below held that the inquiry in satire cases required the court to determine whether the publisher knew or acted in reckless disregard for whether the article could reasonably be interpreted as stating actual facts.[23] Thus the court below focused on the foreknowledge of the publisher that the article would not be recognized as a satire, or the publishers' recklessness in failing to recognize that the article would be taken as true. This holding went beyond any teachings of this Court, and effectively immunizes media defendants from liability in public official libel actions. If a different standard for proof of actual malice is to be devised in satire and parody cases, it should be done by this Court, and it should not be the test adopted by the court below.

The court below looked at the publisher's subjective intent, which is highly relevant in applying the *Sullivan* actual malice test in the context of hard news, but is irrelevant in satire cases. The proper standard is an objective one, applied from the standpoint of a reasonable reader of average intelligence. The subjective belief of the reporter *is* relevant in straight news reporting when it pertains to the reporter's good faith belief that what he has

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[21] Appendix 1.

[22] 376 U.S. at 279-80; accord *Huckabee v. Time Warner Entm't Co.,* 19 S.W.3d 413 (Tex.2000).

[23] New Times v. Isaacks, 146 S.W.3d 144, 163 (Tex.2004); Appendix 1.

published is, in fact, true. For example, a reporter who receives information from a reliable source that a public official has taken a bribe and publishes that information in the good faith belief that it is true cannot be held accountable in a defamation action if the information turns out to be erroneous. If the reporter has acted in the belief that the information is true, and has not been reckless in publishing it, he is immune under the *New York Times v. Sullivan* standard.

In the satire context, the reporter's subjective belief is irrelevant, because he always knows that what he is publishing is not true. The issue is whether the article could be believed to be true by a reasonable reader of average intelligence, and this will almost always be a question of fact for the jury. Unless this objective standard is applied, a reporter's assertion that "I never thought anyone would believe it," will always be an unassailable defense, no matter how believable the stated facts and how false the phony quotations and no matter if one hundred percent of the readers in fact believe the article to be true.

The Texas Supreme Court also erred in its interpretation and application of this Court's opinion in *Hustler Magazine v. Falwell,*[24] stating that this Court "implicitly rejected a literal application of the actual malice rule to works involving satire or parody."[25] Petitioners believe otherwise. In misapplying the *Falwell* line of cases the court below effectively foreclosed any successful defamation claim by a public figure against a media defendant who claims his work was a satire.

The Texas Supreme Court correctly set out the standards for determining whether an article can be taken by the reasonable reader of average intelligence as a report of actual events, but improperly decided the question as a

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[24] Supra.

[25] New Times v. Isaacks, 146 S.W.3d at 163; Appendix 1 at 43.

matter of law, when a jury question is clearly presented under case law of the United States Supreme Court. In this connection the court below improperly concluded that evidence that a large number of readers, including the highly educated, believed the madness article to be a report of actual events is not competent evidence to raise a fact issue. The court compounded this error by disregarding well established law that evidence of a publisher's common law malice is competent circumstantial evidence to prove constitutional actual malice.

Finally, the Texas Supreme Court erred in equating the conduct of the reasonable reader of average intelligence with the hypothetical "reasonable man" of negligence law. This, in effect affords media defendants with a new defense: The negligence of a reader who owes no tort law duty, is now a defense to the media defendant's knowing publication of falsehoods.

Defamation Per Se

It is defamatory *per se* to publish an untrue statement about a public official, which, if true, would subject him to removal from office. *Fitzjarrald v. Panhandle Publishing Co.*, 228 S.W.2d. 499, 505 (Tex. 1950).[26] Without a doubt, Isaacks and Whitten would have been subject to removal from their respective offices, had they engaged in the unlawful and reprehensible conduct falsely attributed to them in the "Stop the Madness" publication.

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[26] A district attorney in Texas is subject removal from office for "incompetency" [sic] or "official misconduct." TEX. LOC. GOV'T CODE ANN., § 87.013 (Vernon 1988). A judge of a legislatively created court could be removed from office for, incompetence, violation of the Code of Judicial Conduct, conduct that casts public discredit on the judiciary, or violation of the penal code. See Appendix 5

Satire and Parody

Respondents maintain that the article is a protected opinion in the form of satire. Publication of an opinion, including satire or parody, will give rise to an action for libel, if the statement of opinion falsely asserts or implies objective facts, and the publication can be understood by a reasonable reader of average intelligence as intended to convey actual facts.

Considering this issue in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990), the United States Supreme Court specifically declined to "create a wholesale defamation exemption for anything that might be labeled 'opinion.'" In *Milkovich,* Chief Justice Rehnquist, writing for the Court, recognized that language in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) had been misinterpreted, and that the *Gertz* language was mere *dictum* which reiterated the "classic 'marketplace of ideas' concept" discussed by Justice Holmes in *Abrams v. United States,* 250 U.S. 616, 630 (1919). Recognizing the flaw in equating the term "opinion" with the term "idea" this Court stated that "expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich, supra,* at 18.

The Court refused to recognize a constitutional privilege for statements of "opinion," holding that the interests in question are adequately protected by other existing doctrines.[27] Principal among these is the "actual

[27] These include the requirements that the plaintiff (1) prove falsity, as well as fault, abrogating any common law presumption in media cases that defamatory speech is false. *Philadelphia Newspapers, Inc., v. Hepps,* 475 U.S. 767, 777-78 (1986); (2) statements of opinion that cannot be "reasonably interpreted as stating actual facts" are protected under the First Amendment. *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50 (1988); *Letter Carriers v. Austin,* 418 U.S. 264, 284-86 (1974); *Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler,* 398 U.S. 6, 13-14 (1970) Statements are protected if the amount to nothing

malice" standard developed in *New York Times Co. v. Sullivan.* [28]

Analysis under *Milkovich* and Its Progeny

A fundamental issue in this case is the *Observer*'s assertion that the offending article was mere satire and parody, amounting to "imaginative expression" and "rhetorical hyperbole" that could not "reasonably be interpreted as stating actual facts" which bring it into the realm of non-actionable pure opinion under the rule of *Hustler Magazine v. Falwell, supra.* A detailed analysis of the facts and law is prohibited by the constraints of this petition, but a few principles demonstrate the approach which a court must take. The inquiry is whether a reasonable finder of fact could conclude that the statement in question implies an assertion of objective fact. One approach has been to inquire whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; whether the defendant used figurative or hyperbolic language that negates that impression; and whether the statement in question is susceptible of being proved true or false. *Partington v. Bugliosi.*[29] A similar approach is to examine the format of

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more than "rhetorical hyperbole" which could not reasonably be understood as describing actual facts about the plaintiffs or actual events in which they participated; (3) an appellate court must make an independent examination of the entire trial record to assure that a judgment does not constitute an improper intrusion upon free expression, and the issue of the sufficiency of the evidence to support a finding of actual malice is a question of law. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 685 (1989).

[28] 376 U.S. at 279-80, i.e., "knowledge of the falsity or reckless disregard for the truth;"

[29] 56 F.3d 1147, 1153 (9th Cir. 1995).

the publication, its structure, its tone, and its breadth. *Phantom Touring, Inc. v. Affiliated Publications.*[30]

These cases simply stand for the proposition that the article must be taken in context for determining the expectations that should arise in the reasonable reader of average intelligence.[31]

The article in question was indexed and published under the heading as "News", in a section of the publication normally reserved for hard news stories, in a newsweekly devoted to hard-hitting investigative journalism, sandwiched between two hard news items, by an award-winning author of feature articles. There is nothing about the context, tenor, or format to warn the reasonable reader to expect opinion.

The context of the *Observer* article is consistent with factual reporting of the news. It is presented as a factual account of actual events, and in typical fashion it includes quotes from the parties involved. This Court has written at length about the potential harm of fabricated quotations that amount to defamation. *Masson v. New Yorker Magazine.* [32] Recognizing that "quotations may be a devastating instrument for conveying false meaning," the Court held in *Masson* that a fictitious quote equates with knowledge of its falsity, *i.e.,* constitutional actual malice, unless it is an immaterial alteration of a statement actually made. *Id.* at 517. [33]

The "Stop the Madness" article published by the *Dallas Observer* is simply not of such outrageous nature as

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[30] 953 F.2d 724 (1st Cir.), *cert. denied,* 504 U.S. 974 (1992).

[31] *See also, Moldea v. New York Times Co.,* 22 F.3d 310, 313 (D.C. Cir. 1994) (court struck libel claim in part because statements "were evaluations of literary work which appeared in a forum in which readers expect to find such evaluations").

[32] 501 U.S. 496, 511-12 (1991).

[33] Accord, *Carson v. Allied News Company,* 529 F.2d 206, 213 (7th Cir. 1976).

to readily convince the reasonable reader that it is purely an expression of opinion. This fact is driven home by the overwhelming response of those readers who believed the article. The article does not disclose non-defamatory facts upon which an opinion is based, it does not present mixed information, and it does not invite the reader to draw other conclusions. It simply presents conclusions that the described events occurred, impliedly based upon facts to which the author was privy.

All the statements in the article are provably false, and therefore verifiable.[34] The *Observer* article is replete from beginning to end with assertions of fact that are provably, and admittedly, "made-up" and "fictional." If the statements in question were vague and indefinite and constituted evaluative opinion, how could the Respondents admit that they were fictional? This point was well made by the Seventh Circuit: "While an opinion can be right or wrong, it cannot be true or false." *Brown & Williamson Tobacco Corp. v. Jacobson.* [35]

Actual Malice

"Actual malice" is present when a defamatory statement is made "with knowledge that it was false or with reckless disregard of whether it was true or not."[36] Actual malice can be proven through circumstantial evidence, and it is by no means necessary for a defamation plaintiff to secure an admission from the publisher of his subjective

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[34] Among those facts described in the publication that are easily provable as true or false are: whether the court proceeding occurred at all, whether Whitten indeed jailed 6-year-old Cindy Bradley, whether Isaacks actually contemplated her prosecution, and whether Isaacks and Whitten made the statements attributed to them. These facts are deductive, not evaluative.

[35] 827 F.2d 1119, 1131 (7th Cir. 1987).

[36] *New York Times Co., supra,* at 279-80.

guilt.[37] Clearly, objective evidence of the circumstances surrounding the publication from which actual malice might be inferred is sufficient. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000).

Respondents and the Texas Supreme Court wish to rewrite almost 40 years of *New York Times* law to establish an exception to the actual malice rule for cases involving fiction, satire, or parody. Quite simply, this rule would be that, if an author did not subjectively intend for his publication to be believed, there could be no finding of actual malice. This is the source of the Texas Supreme Court's erroneous conclusion that this Court in *Hustler Magazine v. Falwell* "implicitly rejected" the literal application of the *New York Times* actual malice test in satire cases. Under *Sullivan* and *Falwell*, however, if a satire or parody is perceived by a reasonable reader of average intelligence to convey actual facts, actual malice is present, whether or not the author subjectively intended to deceive the reader. Similarly, if such publication is made with reckless disregard of whether a reasonable reader could believe the article to state actual facts, the constitutional actual malice test is met. The holding of the court below that *Falwell* implicitly rejected the literal interpretation of *Sullivan* should not be permitted to stand.

Respondents relied on *Hoppe v. Hearst Corp.*[38] which espouses a different test for actual malice in the area of "satire, humor, or fiction."[39] That test is "whether the author intended, or recklessly failed to anticipate, that readers would construe the publication as a statement of defamatory facts." *Hoppe* has not been widely accepted nor followed by other courts and has certainly been neither

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[37] *See, e.g., Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 667-* 668; *Herbert v. Lando,* 441 U.S. 153, 160 (1979).

[38] 53 Wash. App. 668, 770 P.2d 203 (Wash. Ct. App. 1989).

[39] *Id.*, at 208.

approved nor endorsed by the United States Supreme Court. It is not the law of the land. Furthermore, even if *Hoppe* applied to the case at bar, it would weigh directly in Petitioners' favor, because the summary judgment evidence in this case certainly raises a genuine issue of material fact as to whether the Respondents "recklessly failed to anticipate" that their article would be taken as true. Of course, the *Observer* disavows this element of the *Hoppe* test and claims that the Washington court was in error in going this far.

The reliance by the court below upon *Dworkin v. Hustler Magazine, Inc.*[40] is wholly misplaced. The *Dworkin* court theorized in *dicta* that since one who intends a satire intends it to be recognized as such "there is no consciousness that [the publisher] is publishing something false, because [the publisher doesn't] think [he's] publishing a statement of fact."[41] The quoted language is not a rule of law, nor does it establish a different standard of actual malice in cases such as the case at bar. But, assuming *arguendo*, that it bears some precedential value, it should take no more than a moment to conclude that it does not apply to this case. The hypothetical case discussed in *Dworkin* is one in which "the [publications] contain no statements of fact." An assertion that Judge Darlene Whitten (a real judge sitting in a real court) and Criminal District Attorney Isaacks (a real district attorney) jailed 6-year-old Cindy Bradley is a false, defamatory statement of fact.

Hustler Magazine v. Falwell

It is telling to compare the style and format of the publication in this case to that which was at issue in *Hustler Magazine v. Falwell, supra*. There the Court applied the

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[40] 867 F.2d 1188 (9th Cir. 1989).

[41] *Id.*, at 1193-94 (citations omitted).

New York Times standard to Falwell's claim of intentional infliction of emotional distress, holding that state law standards of intentional infliction of emotional distress would not satisfy the *New York Times* standard. The Court held that Falwell, to prevail, must prove that Hustler had knowingly published defamatory falsehoods, or that it had published such falsehoods with reckless disregard as to their truth. *Id.*, at 56.[42]

In the present case the *Observer,* unlike Hustler did nothing to directly inform the reader that the story was a fictional parody. It contained no heading or disclaimer to so inform the reader. For the reasons discussed the madness article by its context was not an obvious satire. The article did not follow the format of a well-known ad campaign or other format that would have led the reader to the conclusion that it was a satire. In *Falwell* a jury had found that the phony ad parody could not have been taken by the average reader as a statement of actual events. In the present case the court below has misapplied both *Sullivan* and *Falwell* and usurped the function of the jury.

If *Sullivan* as followed in *Falwell* states the applicable law, then the *Dallas Observer's* arguments are without merit. The *Falwell* Court noted that the jury had found against Falwell on his libel claims because the *Hustler* parody was published in such a manner that no reasonable reader could have believed it to be a depiction of actual events. The Court's language clearly indicates its

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[42] The facts in *Falwell* differ from the present case. In *Falwell* the publisher of *Hustler* had gone to some lengths to inform the reader that the "advertisement" which held Falwell up to ridicule was, in fact, not a depiction of actual events, but a parody. The phony ad was based upon a well known series of ads for Campari Liqueur, in which various celebrities spoke of their "first time" to drink the product. In small print at the bottom of the page, the ad contained a disclaimer, "ad parody -- not to be taken seriously." The magazine's table of contents also listed the ad as "Fiction; Ad and Personality Parody." *Id.* at 48.

belief that this is a question of fact for the jury under traditional standards of libel law.

QUERY: If the *Falwell* parody had not contained the prominent and unequivocal disclaimers; had been indexed and published as a "news" article; had been carried in a publication noted for aggressive investigative journalism rather than a magazine infamous for similar outrageous parodies and the ravings of its equally outrageous publisher; had been written by an award winning investigative journalist; had been sandwiched between two serious articles; had been met with outrage by large numbers of readers who thought it depicted actual events; and had contained phony photographs of a young Jerry Falwell and his mother, **can it be said as a matter of law that a reasonable jury could not have concluded that an ordinary reader of average intelligence could have reasonably believed the article to be a depiction of facts?** If a reasonable jury could so conclude, then the Supreme Court decision in *Falwell* leaves little doubt that a jury in the present case could so find, and the Texas Supreme Court erred in holding to the contrary.[43]

The "reasonable man"

The Supreme Court of Texas erred by equating the hypothetical "reasonable man" of the negligence case with the "average reader of ordinary intelligence" discussed in *Hustler Magazine v. Falwell.*[44] These are two distinct legal characters, created by the courts for two distinct functions. This court below erred in adopting the reasoning of *Patrick*

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[43] Petitioners are aware that this Court rarely reviews erroneous application of settled law and the fact findings of state courts. In this case the erroneous fact findings result from the Texas Supreme Court's application of its own departure from *Sullivan* and *Falwell.*

[44] 485 U.S. 46 (1988).

v. Superior Court[45] to effectively predetermine all future satire defamation cases adversely to all public officials and public figures.

The hypothetical "reasonable man" is a judicially created fiction whose function is to measure objectively the reasonableness of the conduct of an allegedly **negligent actor who owes a duty of "ordinary care under the same or similar circumstances" to another injured in his person or property by the actors conduct.**[46] [47] The court below focused on the alleged shortcomings of readers who have no tort duty whatsoever, and glossed over the conduct of Respondents who have specific and well defined duties to avoid making false, defamatory statements of fact about others.

The opinion below adopts the allegedly negligent conduct of readers as a defense to Respondents' actionable conduct. This improperly focuses on the reader, not the

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[45] 27 Cal. Rptr. 2d 883, 887 (Cal. Ct. App. 1994).

[46] The fictitious reasonable man is the standard to measure an actor accused of negligence, **and therefore presupposed to owe a duty to his injured victim.** This paragon "is required to do what such an **ideal individual** would be supposed to do in [the defendant's] place....He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person who is always up to standard....[He] is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment. PROSSER & KEETON ON TORTS, §32 (5th ed., West, 1984, Lawyer's Ed.) (hereafter PROSSER & KEETON).

[47] The reasonable man standard of negligence law is to provide the court and jury with an **ideal person** to determine "whether the [actor's] harm-causing conduct was too risky. Apart from the risk of harm to others, courts are not interested in whether the [actor] was unreasonable." 1 DOBBS, THE LAW OF TORTS § 117 (West 2001) (hereafter DOBBS).

publisher and poses some very interesting questions which cannot be covered in this page-restricted motion.[48]

The Texas Supreme Court's erroneous adoption of negligence law's "reasonable man" is refuted by its own analysis. The court below stated the proposition that the more subtle the satire, the greater the chance of misunderstanding.[49] *Precisely!!* But since the "reasonable man" never fails to "get the joke" no satire, good or poor, will be a basis for defamation.[50] Any person, no matter how educated and street wise who understands the article as a report of actual events has by definition of the court below failed to use ordinary care in reading and evaluating the publication. Taken to its logical conclusion, one hundred percent of the 200,000 *Observer* readers could believe "Stop the Madness" to be a report of true events, but the court below would conclude, as did *Buzz* that they are "clueless."[51] To hold that the testimony of these otherwise normal, reasonable adults is, as a matter of law, incompetent to raise a fact issue is even stranger than the

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[48] For example, to whom did the readers of "Stop the Madness" owe a duty of ordinary care?

[49] Quoting BRUCE W. SANFORD, LIBEL & PRIVACY 193-94 (2d ed. 1991).

[50] The Texas Supreme Court's action in forcing the "square peg" of the "reasonable man," into the "round hole" of the "average reader of ordinary intelligence" is a formula for mischief, because it means that any purported satire will always be sniffed out and recognized by the "reasonable man," no matter how false and defamatory the stated facts, and no matter how subtle the clues.

[51] A scientific survey of readers of ordinary intelligence that showed that 25, 50, 75 or even 100 percent of readers believed the story would be irrelevant. Petitioners intended to make a showing at trial to the effect that the story was assigned to a group of journalism graduate students who were unaware of the controversy. Only a minority recognized the story as a satire. This too is irrelevant under the opinion below. So much for the principle that a non-movant need not marshal all his evidence to defeat a summary judgment.

Observer's decision to satirize an event that never happened.

The real question is whether a "reasonablereader of average intelligence" could read the article and believe it to be true. The court below supplied its own interpretation of material evidentiary "clues" to the fictional nature of the article, and concluded as a matter of law that the article could not be reasonably understood as stating actual facts about Isaacks and Whitten. While the "reasonable minds" in the trial court and court of appeals had no trouble in stating the applicable law, they ceased to be "reasonable minds" when they came to the opposite conclusion about the impact of article on the "reasonable man."

One reason for this difference of opinion is that the trial court and court of appeals placed themselves in the shoes of the reader; the Texas Supreme Court did not. All the judges who have reviewed this case knew that the article was not a depiction of actual events; the Supreme Court of Texas, however, did not view the article in the eyes of a reader who had no foreknowledge that it was an attempt at satire; rather it indulged every presumption in favor of the "reasonable man" having the same foreknowledge. When "Stop the Madness" was published, only the Petitioners and Respondents knew it was not true. The "reasonable reader of average intelligence" picked the paper up from the newsstand expecting news.[52] Both "careful readers" and "skimmers" concluded that the article depicted actual events. These were newspaper readers, not Supreme Court Justices with the benefit of foreknowledge. The *Observer* claims to be a weekly "alternative" paper reporting in

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[52]He read it on his commute, or while eating breakfast or lunch, or on his morning break, or in stages between phone calls at work or home. It was not a homework assignment or a document upon which he would reasonably expect to be examined. He did not owe any tort law duty. Some read the entire article, others the highlights.

greater depth than the daily competition. Thus the testimony of Julie Lyons relied on by the court below as evidence that the reader could expect to find a satire says just the opposite. The *Observer* has in effect said, "when you read our paper you will get the real, behind the scenes truth." When a story is "made-up" it is all the more likely to be believed by the "average *Observer* reader of ordinary intelligence" because he looks to the *Observer* for truth.[53] One might inquire how the court below can use examples of readers who were fooled into belief that a satire was true to show that reasonable people are sometimes fooled and therefore acted unreasonably under the circumstances, while at the same time holding that a plaintiff who produces readers who were fooled as evidence that the article could be taken as true has not produced summary judgment evidence raising a question of fact. The *Observer's* very market niche and self promotion as the place to find the "truth" ignored by the establishment press makes it more likely, not less, that the "reasonable reader" would take the article in question as true.

Evidence of custom and practice are relevant to determine whether the actor's conduct meets the legal standard.[54] Courts frequently adopt customary community behavior as indicative of how a reasonable person would

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[53] The court below uses examples of intelligent readers being fooled as proof that readers of the *Observer* should not have been surprised to find a satire sandwiched between two hard news stories in a section of the paper labeled and indexed as "news." The examples prove the opposite. Deborah Norville being fooled by a story in *The Onion* is only proof that she was not familiar with that publication which is an on line publication devoted exclusively to Satire and Parody. Anyone familiar with that publication would be shocked to find a serious article. Similarly a reporter in China unfamiliar with American journalism and American culture might be expected to misunderstand a published satire that the average American reader would immediately grasp.

[54] See generally PROSSER & KEETON § 33; DOBBS §§ 117, 122.

behave.[55] The court below adopted the "reasonable man" standard but failed to educate the bench and bar as to how this fellow ordinarily acts. It seems to Petitioners that the court below has gone too far by holding reasonable readers to the standard of perfection demanded in the negligence context. The court below cites only a copyright infringement case for its rejection of the proposition that some who might be denominated reasonable readers will form opinions before completing the entire article.[56] Custom and practice go to the very heart of whether particular conduct is reasonable under the circumstances. A reader cannot be charged with assuming that a story appearing in the news section of the paper is not what it appears to be on the surface;[57] nor with assuming that real public officials, to whom quotes are attributed, did not

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[55] DOBBS § 117 at 279; PROSSER & KEETON § 33 at 193-94.

[56] The court cites *Campbell v. Acuff-Rose Misic, Inc.*, 510 U.S. 569, 583 (1994); this case does not speak to the question of what conduct is expected of a reasonable reader in a defamation case.

[57] The court relies upon anecdotal evidence that persons have mistakenly taken satire for fact before as evidence that the fact that some persons were misled not being evidence of the conduct of the reasonable man. This argument misses the point. In none of the instances cited were the rights of individuals to their well-earned reputations at stake. Moreover, the evidence declared insufficient in *San Francisco Bay Guardian v. Superior Court*, 21 Cal. Rptr. 2d 464, 467 (Cal. Ct. App. 1993) was reviewed under the more stringent "clear and convincing evidence" standard. Petitioners in this case operated in good faith under the tradition Texas summary judgment standards. Under Texas law the plaintiff need only raise the favorable evidence at the summary judgment stage, but must meet the clear and convincing evidence standard at trial on the merits. *Huckabee v. Time Warner, supra* at note 22. The many persons of more than average intelligence and savvy who were fooled by the article are circumstantial evidence that the article was false and defamatory. At trial Petitioners intended to go into great depth with as many of these individuals as possible to determine the circumstances of their reading the article, all or part, and the conclusions they reached.

make the statements; nor with assuming that the picture of Cindy is not really Cindy, and that Cindy does not really exist; nor with knowledge that GOOF is not a real crackpot organization that one runs into ever more frequently in modern times; nor with knowing that the real ACLU official "quoted" did not make the statement; nor with knowing that the School Superintendent and the Governor did not make the "no tolerance" statements attributed to them. Every parent of a child in public school has read actual accounts of the "no tolerance" policies now in vogue. The story may very well have been believed by the "reasonable man" without deviation from the standard of care required by society.

The use of the reasonable man of negligence law as identical to the average reader of ordinary intelligence, is the wrong tool for the wrong purpose.

The "average reader of ordinary intelligence" of defamation law is not negligence law's "reasonable man." His purpose is to restrict the responsibility of the press to a real world standard. In *Hustler Magazine, Inc. v. Falwell*[58], the court made abundantly clear that in cases of satire the standard of *New York Times Co. v. Sullivan*[59] was applicable. The court below relied on *Greenbelt*[60] line of cases for the proposition that the Observer article was hyperbole that no reasonable person could take literally. But each of the cases relied upon by this court were distinguished by the court of appeals and by Petitioners. The *Falwell* court, the court of appeals below, and the case law all recognize that the inquiry is extremely fact specific, and is best left to a jury.

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[58] 485 U.S. 46 (1988).

[59] 376 U.S. 254 (1964).

[60] *Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler*, 398 U.S. 6 (1970)

The story was written with the express purpose of holding Whitten and Isaacks up to ridicule. The court below opined that *Falwell* forecloses the use of evidence of common law malice as evidentiary of constitutional malice. The case does not so hold. It has been held that a media defendant's negligent conduct may be taken as evidence of the defendant's inner awareness of probable falsity. If he publishes wholly unverified facts the jury may be permitted to conclude that he in fact knew or had serious doubts about his story's truth.[61] Similarly, post *Falwell* case law demonstrates the publisher's spite and ill-will may be admissible to buttress evidence of knowing falsehood by showing a motive to lie. *Celle v. Filipino Reporter Enters, Inc.*[62] Under *Milkovitch*,[63] the statements of fact are provably false, and thus not opinion. All the principals in publishing the story testified that they knew it was not true when published. This alone is enough evidence of constitutional malice to raise a fact issue and have a trial.

REASONS FOR GRANTING THE WRIT

This is a First Amendment public official libel case of first impression. This Court has never squarely faced and decided the applicable standards governing how to determine if an alleged satire is actionable. This court has not spoken directly to the question of how the *New York Times v. Sullivan* actual malice standard is to be applied in a case of alleged satire. This court has not determined whether, as Respondents contend, the publisher of a satire is protected if he did not intend his work to be taken as a depiction of actual fact, or whether the focus must be on the reaction of the reasonable reader of average intelligence to the article.

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[61] St. Amant v. Thompson, 390 U.S. 727 (1968).
[62] 209 F.3d 163 (2d Cir. 2000).
[63] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)

If the standard promulgated by the media and the court below is the law of the land, there is no basis for a public official to sue a media defendant who claims to have written a satire.

The court below also erroneously attributed to *Falwell* an implicit rejection of *Sullivan.* Although *Falwell* concerned a parody, a jury had determined that no reasonable reader could have taken it as a report of actual events. Thus the Court in Falwell did not squarely face the issues presented here.

The Supreme Court of Texas has pronounced a rule that goes far beyond the language of *Sullivan* in considering the actual malice question. That court has also held that *Falwell* implicitly held that the Sullivan standard may not be literally applied in a case of purported satire, the only court of last resort to so hold insofar as Petitioners are aware.

That court has further held that under no circumstances are the actual reactions of purported reasonable readers competent to raise a fact issue.

That Court has further opined contrary to established case law that common law actual malice may not be used as circumstantial evidence of constitutional actual malice, even when coupled with a defendant's admission that he knew the article was untrue when it was published.

Finally, the Supreme Court of Texas has totally misconstrued the nature of the reasonable reader of ordinary intelligence and improperly equated him with the reasonable man of negligence law. In effect the court below has said that even though a reader has no tort duty, his failure to recognize all the clues that a particular article is satire, no matter how subtle, renders him a "negligent reader" and provides a defense to the publisher. The court

compounds this problem by holding the reader of a newspaper article to the careful standard that might apply to a professional reading a text, treatise, or technical journal in connection with a duty to a client or employer. Rather, the law should be that the standard is to be judged by the customary conduct of the average newspaper reader, who looks at the paper on his commute, over his morning coffee, or in disjoined moments between the other tasks of daily life.

This case has importance to the media, to public officials, and to the bar. More importantly it is important for this Court, in the exercise of its duties as the final arbiter of our Constitution, to elucidate the standards by which we are to be governed in cases of this nature.

CONCLUSION

This Court should grant this petition for writ of certiorari and after briefing on the merits and argument reverse the decision of the Texas Supreme Court and remand this case for trial on the merits.

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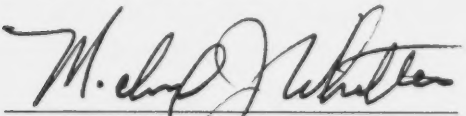

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